

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-212937.2

DATE: June 18, 1984

MATTER OF: Dresser Industries, Inc.--Reconsideration

DIGEST:

1. Protest to GAO filed within 10 working days of initial adverse agency action on prior protest to the agency is timely.
2. Sole-source procurement of military tractors for use under combat conditions may be justified on the grounds of standardization and interchangeability of parts with tractors already in the agency's inventory even though the units to be purchased, while substantially similar to, are not absolutely identical with those already in the inventory. There is a significant difference between no standardization at all and standardization to the extent possible.
3. Where a sole-source negotiated procurement is justified as promoting standardization and interchangeability of parts with equipment already in the agency's inventory, GAO will not consider protester's allegations that a competitive procurement would have enabled the government to purchase more advanced, but less expensive, equipment, the parts of which would not be interchangeable with existing equipment.
4. Agency determination involving technical matters will be questioned only upon a clear showing of unreasonableness.
5. Even if the determination and findings authorizing sole-source negotiation are defective, the resulting award is not improper if the circumstances surrounding the procurement justified a sole-source award.

6. Express ratification of an allegedly unauthorized letter contract under which the government receives a benefit renders payment under the contract proper.
7. A firm need not be found nonresponsible merely because it is undergoing bankruptcy proceedings.
8. GAO will not review an affirmative determination of responsibility in the absence of either a showing of possible fraud or of the misapplication of definitive responsibility criteria.

Dresser Industries, Inc., requests reconsideration of our decision in Dresser Industries, Inc., B-212937, Sept. 21, 1983, 83-2 CPD ¶ 355, wherein we dismissed as untimely its protest against the Marine Corps' sole-source procurement from the TEREX Corporation of articulated steer tractors with forklift and bucket attachments.

Dresser denies that its protest was untimely, argues that the Marine Corps' decision to standardize on the TEREX tractor was unwise and improper, and contends that the subsequent award of a letter contract to TEREX was illegal. Although we now agree, upon the basis of further information supplied by Dresser, that its initial protest to our Office was timely, we deny the protest on the merits.

#### Reconsideration of Timeliness

Our Bid Protest Procedures generally require that protests be filed with our Office or the contracting agency within 10 working days after the basis for them is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a) and 21.2(b) (1984). On September 6, 1983, when Dresser filed its initial protest with our Office, it failed to mention that it had previously protested to the contracting agency. Since a synopsis published in the June 30, 1983 edition of the Commerce Business Daily stated that the Marine Corps was negotiating with TEREX, and since protesters are charged with constructive notice

of such announcements, see Scripto, Inc., B-209450, Nov. 9, 1982, 82-2 CPD ¶ 431, we concluded that Dresser had notice of the facts giving rise to its protest more than 10 working days before the filing with our Office. Accordingly, we dismissed the protest as untimely. See Welbilt Electronic Die Corporation, B-208227, Oct. 12, 1982, 82-2 CPD ¶ 326.

Dresser now informs us that it initially filed a protest received by the Marine Corps on July 13 and denied on August 29. Dresser protested here within 10 working days of its receipt of the denial as required by our Bid Protest Procedures, 4 C.F.R. § 21.2(a). We will consider, therefore, its allegations on the merits.

#### Statement of Facts

The Marine Corps categorizes the tractors being procured here as tactical vehicles capable of operating in rough terrain. They serve a combat support function and are to be used to tow other vehicles, to handle up to 10,000 pounds of material when equipped with a forklift attachment, and, when equipped with a bucket, to dig artillery emplacements, prepare field fortifications, construct or repair roads and aircraft landing sites, and to prepare beaches for amphibious operations.

In 1967, the Marine Corps purchased 122 articulated steer tractors from the Euclid Division of General Motors Corporation, now TEREX. Through the exercise of options and through subsequent sole-source procurements, the Marine Corps acquired an additional 306 tractors for a total of 428. The Marine Corps also procured bucket and forklift attachments from TEREX and, in 1978, awarded a sole-source contract to TEREX for rebuilding 367 of the tractors remaining after attrition. The rebuilt tractors were designated as model No. 72-31MP2U/R.

Since that time, the Marine Corps has established an inventory objective for 579 articulated steer tractors, 446 forklift attachments, and 344 bucket attachments. It currently has 369 tractors and 257 forklift and 196 bucket attachments, and is now procuring an additional 92 tractors and 116 forklift and 67 bucket attachments. The

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Marine Corps expects to replace its entire inventory of tractors by a competitive procurement in fiscal year 1988.

The Marine Corps informs us that most of the tractors at issue here will be placed on maritime prepositioning support (MPS) ships. These are part of a Department of Defense program in which multipurpose cargo ships, carrying enough supplies and ammunition to sustain a Marine brigade for 30 days, will be deployed so that during a time of international crisis they can rapidly be moved to areas of concern and joined by airlifted Marine units.

The first of these ships is to be delivered in August 1984, with loading commencing in September 1984.

To obtain the additional tractors and attachments, the Chief of Naval Material requested authority to negotiate a sole-source, firm fixed-price contract with TEREX at an estimated cost of \$11,042,000, including \$8,413,000, or \$91,446 each, for the 92 tractors. As justification for negotiation, the Marine Corps cited 10 U.S.C. § 2304(a)(13) (1982) and Defense Acquisition Regulation (DAR) § 3-213, reprinted in 32 C.F.R. pts. 1-39 (1983). The statute and implementing regulations permit negotiation for technical equipment when standardization and the interchangeability of parts are necessary in the public interest and when procurement by negotiation is necessary to assure that standardization and interchangeability. The DAR states in pertinent part:

"3-213.2 Application.

"(a) The authority of this paragraph 3-213 may be used for procuring additional units and replacement items of specified makes and models of technical equipment and parts, which are either: (i) for forces whose primary mission is to participate in combat and the integral supporting elements thereof, or . . . for use in Alaska, Hawaii or outside

the remainder of the United States, in theaters of operations, on board naval vessels, or at advanced or detached bases; and which have been adopted as standard items of supply in accordance with procedures prescribed by each respective Department. A current or recurring procurement requirement for the item shall be present.

"(b) This authority would apply, for example, whenever it is necessary:

(i) to limit the variety and quantity of parts that must be carried in stock;

(ii) to make possible, by standardization, the availability of parts that may be interchanged among items of damaged equipment during combat or other emergency . . . ."

In a determination and findings dated April 10, 1983, the Assistant Secretary of the Navy for Shipbuilding and Logistics approved negotiation with TEREX, finding that because of differences in manufacturing techniques, other suppliers would produce tractors with such varied physical characteristics and performance that standardization and interchangeability would be precluded. Such standardization was found necessary and in the public interest to:

--assure the readiness, maintainability, and reliability of the equipment;

--materially reduce the quantity of spare parts required to be carried; and

--make possible the interchange of parts among pieces of damaged equipment during combat or any other emergency.

However, the Assistant Secretary conditioned his approval on the requirement that:

" . . . prior to contract award a fair and reasonable price is established as a result of either audit of the contractor's proposal by DCAA [Defense Contract Audit Agency] or by determination of the contracting officer that the government is receiving most favored customer prices, as evidenced by published price lists, previous invoices, or other price analysis documentation."

TEREX subsequently offered to supply its model No. 72-31MP2U, a 10,000 pound capacity, articulated steer tractor which it described as "identical (except as noted . . .) to the 72-31MP2U/R tractors" in the Marine Corps inventory, at an estimated price of \$9,533,201 for the tractors and attachments, plus \$116,653 for the necessary manuals and other documentation.

In August 1983, stating that award by November 1 was required in order to meet the September 1984 date for loading the tractors on the MPS ships, the contracting activity requested and received authority to enter into a letter contract with TEREX. Under a contract signed September 23, 1983, TEREX agreed to deliver 92 tractors, with 116 forklift and 67 bucket attachments. The letter contract initially included a ceiling price of \$4,824,927 and established a target date of May 1, 1984 for agreement on a firm fixed price; by amendment, the ceiling was increased to \$9,649,854.

In its request for authority to enter into the letter contract, the Marine Corps had stated that the contractor would be required to submit cost and pricing data before definitization of the contract. By memorandum dated November 28, 1983, the Under Secretary of the Navy specifically approved the letter contract with TEREX; in addition, he changed the time for establishment of a fair and reasonable price from before contract award to before definitization of the letter contract.

#### Dresser's Protest and Agency Responses

Dresser contends that standardization on the TEREX tractor is both unwise and improper, because the model

being procured, No. 72-31MP2U, is not identical to that currently in the Marine Corps' inventory, No. 72-31MP2U/R. The firm urges that the Marine Corps should either standardize on its own tractor, a rough terrain, 10,000 pound capacity forklift tractor, model No. M10A, or at least open the procurement to competition.

#### A. Standardization on TEREX Tractors

Dresser argues that the tractor now being procured is "mostly different" from the one in the Marine Corps' inventory. While the Marine Corps states that there are only 549 new parts being added to the 4,877 parts of the existing tractor, Dresser disputes these figures. The firm suggests that a close examination of the Marine Corps stocklist establishes that there are only 3,969 replacement parts for the existing tractor, or 4,050 parts with bucket and forklift attachments; it argues that the estimate of only 549 new parts derives from TEREX figures, with no evidence of independent verification by the Marine Corps. Moreover, Dresser contends, even if the estimate was accurate when it was made, the figure is likely to increase as TEREX, which has not manufactured the commercial equivalent of the 72-31MP2U/R since 1978, discovers that its former suppliers have discontinued some parts.

As evidence of the many changes that allegedly are being made, Dresser cites the large number of pages in the technical manual which TEREX's proposal indicates must be changed for the new model. While some of these revisions may be, as suggested by TEREX, merely minor editorial changes or reflect only the redesignation of parts, Dresser believes that others indicate substantial changes in the equipment. For example, the previous transmission is no longer manufactured as a complete unit, and accordingly it has been replaced with a different, allegedly more advanced one. According to Dresser, this has caused a change in the differential ratio and in the parking brake, as well as an increase in the number of speeds for the new model.

Dresser also believes that changes have occurred in the engine. Although both the existing and the new tractors have 284-cubic inch, 2-cycle engines manufactured by Detroit Diesel, Dresser infers significant changes in parts and design from a new engine model number, an increase in flywheel horsepower, and a concurrent change in maximum torque. Dresser alleges that such parts of the power train as the engine, transmission, torque converter and differential/axle are both the most critical to the continued operation of the equipment and the most susceptible to wear and failure, and may comprise up to 80 or 85 percent of the spare parts a user stocks.

In its response, the Marine Corps disputes the extent and effect of the changes being made to the new tractor. Most of the 549 new parts already are in the Department of Defense supply system, and only 100 of these affect the stocking of spares, the Marine Corps states.

In regard to the engine, the Marine Corps reports that the new model number is merely the current Detroit Diesel designation for the engine installed in the existing tractor; it attributes the changes in flywheel horsepower and in torque to a reduction in parasitic power losses made possible by installation of a new hydraulic pump. In short, the Marine Corps maintains that the engines for two tractors "are essentially the same and are interchangeable . . . ."

TEREX 72-3IMP2U Tractor  
vs.  
Dresser M10A Tractor

Dresser argues that its own tractor, the M10A, is a superior, state-of-the-art vehicle available at a price well below that likely to be established under the contract with TEREX. Dresser informed the Marine Corps before award that it is currently manufacturing this tractor under an Army contract at a firm fixed price of \$72,011.92 each (subject to an economic price adjustment in April 1984). Dresser states that the Army is entitled to purchase an optional 769 units, more than 250 of which the Army is willing to make available to other Department of Defense



agencies. Dresser states that it could begin delivery within 4 to 6 months after exercise of the option, and adds that the M10A is fully supported by parts and documentation available through the Defense Logistics Agency.

The Marine Corps, on the other hand, questions whether the M10A would meet its needs. Over and apart from any need for the standardization of and interchangeability of parts for the tractor itself, the Marine Corps contends (and Dresser denies) that the M10A cannot use the TEREX attachments now in its inventory and that the technical literature submitted by Dresser indicates that the M10A is not equipped to use a bucket attachment. The Marine Corps further argues that full provisioning and support for the M10A would require at least 430 days from award. The Marine Corps states that it performs more maintenance at lower echelons than the Army, and that it would require a lengthy review of the documentation for the M10A to ensure that it could be supported in the field to Marine Corps standards.

#### GAO Analysis

If the sole-source procurement of the TEREX tractors is indeed justified on the basis of standardization and interchangeability, we need not determine whether the Dresser's M10A also can meet the Marine Corps' needs. Nor need we decide whether Dresser can supply a tractor with greater performance capabilities at a lesser price than TEREX.

As indicated above, 10 U.S.C. § 2304(a)(13) permits negotiation where the standardization of and the interchangeability of parts for technical equipment is in the public interest and negotiation is necessary to achieve such standardization and interchangeability. The legislative history of this section reveals an intent to avoid the possibility that soldiers, laboring under combat conditions to keep mechanized equipment in working order, would be unable to cannibalize other available equipment because the machines are not standardized--that is, are not

of the same make--and therefore their parts are not interchangeable. See S.Rep. No. 571, 80th Cong., 1st Sess. 9-11 (1947); H.R. Rep. No. 109, 80th Cong., 1st Sess. 10-11 (1947).

Reflecting this concern, the procurement regulations specifically permit the use of negotiation to acquire additional equipment wherever it is necessary to limit the variety of parts that must be carried or to make available parts which may be interchanged among damaged equipment during combat. DAR § 3-213, supra. We have previously found that satisfaction of an agency's need to standardize may justify the purchase of equipment through negotiation on a sole-source basis even where it is alleged that competition would enable the government to acquire other more advanced but less expensive equipment. See Williams & Lane, Inc., B-210940, Aug. 29, 1983, 83-2 CPD ¶ 269; Julie Research Laboratories, Inc., B-199416, June 16, 1981, 81-1 CPD ¶ 493.

Here, the Marine Corps justified negotiation of a sole-source contract to procure the TEREX 72-31MP2U tractor as necessary in order to ensure standardization on equipment to be used under combat conditions by relatively small Marine units far from their primary sources of supply. Such standardization is intended to enhance the maintainability of the equipment by reducing the number of spare parts that must be carried and by making possible the interchange of parts among damaged equipment. The Marine Corps also believes that standardization on TEREX equipment will ensure that operators (and presumably repair crews), who normally use the existing tractors, will be familiar with the ones deployed on the MPS ships.

While Dresser has raised significant questions about the precise extent of standardization, we do not believe that it has shown that there will not be substantial interchangeability of parts between the two models. Cf. Protek Industries, Inc., B-209505, Sept. 22, 1983, 83-2 CPD ¶ 359 (agency determination involving technical matters will be questioned only upon a clear showing of unreasonableness). Even if, as Dresser argues, the number of new parts will increase beyond the 549 already identified, and even if

there are only 4,050 replacement parts for the new tractor with attachments, this figure represents only a 13.56 percent increase in the total number of replacement parts. Although we note that a 1982 TEREX study, based on data supplied by the Defense Logistics Services Center, indicated that only 323 new parts would be required and that this estimate has since increased as a result of "more recent studies and vendor quotations," Dresser has shown us no reason to believe that the growth in the number of new parts to be expected before delivery in September 1984 will exceed the 226 additional parts identified since May 1982. Thus, Dresser has failed to show that the total number of spare parts will increase by more than 20 percent with the introduction of the new TEREX tractors.

Further, Dresser's contention that standardization on the M10A would offer the advantage of interchangeability of parts with the Army's tractors entirely ignores the existence of the 369 TEREX tractors now in the Marine Corps' inventory that will not be replaced until the end of the decade.

Although absolute identity of the TEREX models may not be achieved because of the discontinuance or obsolescence of some component parts, this in no way establishes that standardization, to the extent it is possible to achieve, is an unreasonable goal. We conclude that there is a significant difference, and a significant difference in impact, between no standardization at all and the significant standardization apparently possible here. See Williams & Lane, Inc., B-210940, supra, 83-2 CPD ¶ 269 at 4; Julie Research Laboratories, Inc., B-199416, supra, 81-1 CPD ¶ 493 at 3.

#### Other Bases of Protest

The remaining bases of Dresser's protest are either without legal merit or raise issues that are not for our review.

#### A. Validity of Letter Contract

Dresser argues that the determination and findings (D & F) authorizing negotiation with TEREX were defective. Dresser alleges that the request for authority to negotiate and the resulting authorization were based upon the

identity of the tractors being procured with those in the Marine Corps' current inventory. Absent these, Dresser alleges that there was no authority to negotiate. In view of our conclusion that the TEREX tractors are similar enough to justify standardization, we find this argument without merit. In any case, we have held that a defective D & F does not render a resulting sole-source award improper if, as here, the circumstances surrounding the procurement justified a sole-source award. See Tom Shaw Inc.; Merritt Dredging Company, B-210781; B-210781.2, Aug. 16, 1983, 83-2 CPD ¶ 218.

Dresser also challenges the September 23 letter contract with TEREX, characterizing it as an "undefinitized, unpriced" contract that was illegal because the Marine Corps failed to establish--before award--a fair and reasonable price by means of an audit of TEREX's proposal or by published price lists showing that the government was receiving most favored customer prices. The Marine Corps responds that there was insufficient time in which to conduct an audit and that the new model was not similar enough to TEREX's commercial equipment to permit establishment of most favored customer prices.

In our opinion, the subsequent action of the Under Secretary of the Navy in changing the time for determination of a fair and reasonable price from before award to before price definitization and in specifically approving the letter contract removed any doubts as to the legality of the contract. Moreover, DAR § 3-408 authorizes letter contracts under which a price is to be fixed some time after award, and the Under Secretary's express ratification of this letter contract, under which the government is receiving a benefit, renders payment at the contract price proper in any case. See Rust Tractor Company, 58 Comp. Gen. 789 (1979).

#### B. Responsibility of TEREX


Finally, Dresser questions TEREX's ability to perform, since the firm filed for bankruptcy on November 4, 1983.

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The Marine Corps responds that at the time of award it had no reason to suspect that TEREX might declare bankruptcy.

We will not review an affirmative determination of responsibility--i.e., of a firm's capability to perform--in the absence of either a showing of possible fraud or of the misapplication of definitive responsibility criteria, neither of which is alleged here. See Portland Mailing Services, Inc., B-213321, Nov. 7, 1983, 83-2 CPD ¶ 535. Further, we have held that a firm need not be found non-responsible merely because it is undergoing bankruptcy proceedings. See AMEDCO Health Care, B-213030, Sept. 21, 1983, 83-2 CPD ¶ 357. Finally, any allegations of non-responsibility appear to be unfounded, since the Marine Corps has recently informed us that at TEREX's request its contract has been modified to provide for an earlier delivery schedule and that TEREX may in fact deliver the tractors even before required to do so under the modified schedule. We therefore dismiss the protest on this basis.

For the reasons stated above, the protest on all other bases is denied.

for   
Comptroller General  
of the United States